

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ROBERT L. TUCKER**  
Claimant

VS.

**RAYTHEON AIRCRAFT COMPANY**  
Self-Insured Respondent

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Docket No. 1,020,966

**ORDER**

Claimant requests review of the July 18, 2005 Order denying penalties entered by Administrative Law Judge Nelsonna Potts Barnes. This matter was placed on the Board's summary calendar for determination without oral argument.

**ISSUES**

The Administrative Law Judge (ALJ) found that respondent is entitled to a retirement benefit offset against claimant's temporary total disability benefits (TTD). Therefore, a delinquency did not exist, and claimant's motion for penalties was denied.

Claimant argues that it is not appropriate for respondent to receive an offset for retirement benefits from TTD when claimant is claiming a scheduled injury only. Claimant contends that to allow respondent to take credit in a case of a scheduled injury violates the clear and unambiguous language of K.S.A. 44-501(h) that "in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment."

Respondent argues that claimant's appeal should be dismissed for lack of jurisdiction pursuant to K.S.A. 2004 Supp. 44-551(b)(2)(A) and K.S.A. 44-534a. In the alternative, respondent requests that the ALJ's decision be affirmed because it is consistent with the language of K.S.A. 44-501(h).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record compiled to date, together with the briefs of the parties, the Board finds and concludes that the ALJ's Order should be affirmed in part, reversed in part, and remanded with directions.

Claimant suffered injuries to his left thumb and wrist in a series of accidents from June 2003 through approximately December 23, 2004.<sup>1</sup> On February 16, 2005, the ALJ issued an order requiring respondent to pay TTD at the rate of \$432 per week if claimant was taken off work by the authorized treating physician. Claimant was subsequently taken off work. However, before claimant became eligible for TTD, he began receiving social security retirement benefits. Respondent took an offset for claimant's retirement benefits and paid claimant TTD at the rate of \$171.89. As a result, claimant filed an Application for Penalties requesting that respondent be ordered to pay penalties for its alleged failure to pay TTD at the correct rate. The ALJ found that respondent was entitled to the offset and denied claimant's request for penalties.

This appeal arises out of a dispute concerning the payment of an ordered preliminary hearing benefit, specifically TTD. The Board's review of preliminary orders is limited. In such cases, not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.<sup>2</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues. Whether the ALJ erred in her finding that the evidence shows respondent is entitled to an offset pursuant to K.S.A. 44-501(h) did not exceed the ALJ's jurisdiction and, therefore, would not be an argument the Board has the jurisdiction to consider on an appeal from an order entered pursuant to K.S.A. 44-534a.<sup>3</sup> However, this appeal is not directly from a preliminary hearing order entered pursuant to K.S.A. 44-534a. Rather, it is an appeal from an order denying penalties. And that order arose from claimant's motion for penalties under K.S.A. 44-512a "for failure to comply with the Court's order of February 16, 2005, in particular, failure to pay temporary total disability benefits at the correct rate."<sup>4</sup>

The Board has jurisdiction to review final orders and awards of an ALJ<sup>5</sup>. An award of penalties has been held to be a final award.<sup>6</sup> It follows that a denial of penalties would, likewise, be considered a final order and, as such, is subject to appeal to the Board.<sup>7</sup> Accordingly, the Board has jurisdiction to review the ALJ's Order.

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<sup>1</sup> Form K-WC E-1 (filed Jan. 20, 2005).

<sup>2</sup> K.S.A. 2004 Supp. 44-551.

<sup>3</sup> *Rich v. Beech Aircraft Corp.*, Docket No. 187,685, 1999 WL 557554 (Kan. WCAB June 10, 1999).

<sup>4</sup> Application for Penalties (filed May 3, 2005).

<sup>5</sup> K.S.A. 2004 Supp. 44-551(b)(1).

<sup>6</sup> *Waln v. Clarkson Constr. Co.*, 18 Kan. App. 2d 729, 861 P.2d 1355 (1993).

<sup>7</sup> *Rogers v. Service Trucking*, Docket No. 228,803, 1998 WL780888 (Kan. WCAB Oct. 29, 1998) and *Lyons v. S.W.Bell*, No. 184,807, 1997 WL229456 (Kan. WCAB Apr. 24, 1997).

Turning now to the merits of claimant's argument, the Board disagrees with the notion that the retirement offset should be applied differently according to whether the TTD is being paid for an injury covered by the scheduled injury statute, K.S.A. 44-510d, or whether, instead, the injury falls within the purview of K.S.A. 44-510e and is what is known as an injury to the body as a whole. It is true that the retirement offset could never be applied to permanent partial disability compensation (PPD) for a scheduled injury because for those injuries, PPD is only payable for what is the equivalent of functional impairment. Whereas, the PPD payable for a general body disability under K.S.A. 44-510e can be either based on functional impairment or upon the formula commonly known as work disability. But like work disability, TTD is wage replacement. And that is true regardless of whether the TTD is being paid for a scheduled injury or for an injury to the body as a whole. Furthermore, although the impact is greater upon a scheduled injury, the payment of TTD can reduce the PPD award for an injury covered by either K.S.A. 44-510d or K.S.A. 44-510e.

In addition, K.S.A. 44-501(h) provides that "in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment." But TTD is not a payment for the employee's functional impairment. TTD is payable regardless of whether a claimant has a permanent impairment of function. And that issue has yet to be determined in this case. The Board need not reach the question of how claimant's final award may be calculated. If claimant is determined to have a compensable functional impairment, then the import of the above quoted portion of the retirement offset statute can be addressed in the final award.

The Board agrees with the ALJ's determination that respondent is entitled to the retirement offset contained in K.S.A. 44-501(h). Nevertheless, respondent should have first obtained an order from the ALJ finding that the retirement offset statute was applicable and amending her prior order that provided TTD was to be paid at the rate of \$432 per week before reducing the amount of the weekly TTD payments. The Board finds that the respondent's failure to follow that procedure in this case was improper. This is not a post-award review and modification proceeding as was the case in *Ruddick*<sup>8</sup>. Rather, this issue arose pre-award and, therefore, respondent would ultimately be entitled to a credit or offset at the time of final award or be reimbursed by the Workers Compensation Fund for any overpayment of TTD.<sup>9</sup> Respondent's choice was to either pay the TTD at the ordered rate and seek a credit or offset at the time of the final award or to apply to the ALJ for modification of her preliminary hearing order. The respondent cannot unilaterally choose to disregard the terms of an ALJ's order.

Finally, the Board is mindful that the following statements were made by counsel at the preliminary hearing:

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<sup>8</sup> *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

<sup>9</sup> K.S.A. 44-534a(b) and K.S.A. 44-525(c).

MR. McCLELLAN: I guess just for clarification on the issue, Mr. Wilson just said that the only issue is whether the retirement benefits is [*sic*] appropriate under the Act. Is that what the issue is, or whether it is appropriate in light of the fact that the order is in place?

MR. WILSON: The issue is whether or not the respondent has the right to give themselves credit for Social Security retirement benefits in a medical functional only situation under the Act, and I submit that it's not.<sup>10</sup>

As a part of the remand order, the ALJ is to determine whether the above quoted answer by claimant's counsel to the question posed by respondent's counsel was intended to be or constituted a waiver of any claim for penalties based upon what the Board has found to be respondent's basis for liability, that is, respondent's failure to first obtain relief from the ALJ's February 16, 2005 preliminary hearing order to pay TTD at the rate of \$432 per week before it applied the retirement offset to reduce the amount of the weekly TTD payment to claimant.

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 18, 2005, is affirmed in part and reversed in part and is hereby remanded to the ALJ for a determination of an appropriate civil penalty.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant  
Roger E. McClellan, Attorney for the Self-Insured Respondent

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<sup>10</sup>P.H. Trans. (June 14, 2005) at 5-6.

Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director